

In the Matter of Merchant Mariner's Document No. Z-596362-D1
Issued to: MIGUEL ANGEL PENA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

567

MIGUEL ANGEL PENA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 23 January, 1952, an Examiner of the United States Coast Guard at Baltimore, Maryland, revoked Merchant Mariner's Document No. Z-596362-D1 issued to Miguel Angel Pena upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as messman on board the American SS HIBUERAS under authority of the document above described, on or about 30 December, 1951, while said vessel was in the port of Baltimore, Maryland, he wrongfully had eighteen marijuana cigarettes in his possession which weighed 118.7 grains.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by a Coast Guard officer who also acted as his interpreter. Appellant entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of Port Patrol Sergeant Frederick C. Schmidt who had apprehended Appellant with the eighteen marijuana cigarettes. The Investigating Officer also offered in evidence the U. S. Customs Laboratory Report on the marijuana cigarettes and the U. S. Customs Report of Seizure by Sergeant Schmidt.

In defense, Appellant testified under oath in his own behalf. He stated that he had never seen marijuana before; that he had left his clothes on his bunk while taking a shower and had felt only the handkerchief in the back pocket of his trousers when he put his clothes on again; and that the person previously occupying his quarters had been arrested on 7 December for possession of marijuana.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-596362-D1 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

1. The Hearing Examiner failed to properly appraise the evidence presented.
2. The substance seized remained in the custody of an individual for approximately a four (4) day period, during which time, it could have been unintentionally confused with material of a similar nature.
3. The "Rule of Misconduct" was incorrectly applied in this instance, in that the defendant, a family man, would have taken cognizance of his marital status before departing the vessel in the visible face of a customs search in progress, had he knowingly possessed same seized substance.
4. The defendant voluntarily offered to be cross-examined by the Investigating Officer relative to his conduct aboard the vessel.
5. No proof was offered that proved that such seized substance was in the voluntary possession of the accused while aboard the vessel.
6. The clothes worn by the accused were available to other persons, not in amicable friendship with the accused, for a period of time to have permitted the "planting" of such material.
7. The accused requested the Customs Officer to permit him to see the material seized from his person, which request was denied.
8. The position of the seized material in the clothing of the accused was one in which he could have gone for hours without investigating, but which position would have been a likely one in which to have placed such "planted" seized material.
9. The accused has no Coast Guard record of previous citation.
10. The accused, a married man, with a wife and two small children, is being denied his sole means of employment and family support by the Hearing Examiner with an unjust and exceeding severe penalty on evidence with which the United States Attorney refused to prosecute.

APPEARANCES: Lt. Arthur H. Sheppard, USCG, of Counsel

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 30 December, 1951, Appellant was serving as messman on board the American SS HIBUERAS and acting under authority of his Merchant Mariner's Document No. Z-596362-D1 while the ship was docked at Baltimore, Maryland.

On this date, Sergeant Frederick C. Schmidt was the Customs Guard in Charge and he was patrolling the docks. At about 1230, he stopped at Pier 1, Pratt Street, and searched two men coming from the HIBUERAS which was docked approximately 600 feet from the main gate. A few minutes later, Sergeant Schmidt saw Appellant and the Second Cook leaving the HIBUERAS. After serving the noon meal, the Second Cook had called Appellant and asked him to go across the street for a couple of beers. The two men were not in Sergeant Schmidt's sight at all times after they had departed from the ship but they reached the main gate about two minutes after they had left the ship

and ten minutes after Schmidt had searched the last two men.

Sergeant Schmidt searched the Second Cook first and then Appellant who did not raise any objection to being searched. When Schmidt began to search the back of Appellant's trousers, Appellant said there was only a handkerchief in his pocket. Schmidt took the handkerchief out of Appellant's rear right trouser pocket, unrolled the handkerchief and found in it a Lucky Strike cigarette package containing eighteen hand-rolled cigarettes. Schmidt suspected that the cigarettes contained marijuana and he asked Appellant what he was doing with marijuana cigarettes. Appellant replied that the handkerchief was his but that the cigarettes had been "planted" on him. At approximately the same time as he said this, Appellant attempted to grab the handkerchief and its contents but Sergeant Schmidt retained possession and subsequently turned the cigarettes over to the proper authorities for analysis after he had initialled and dated the Lucky Strike package.

A search of Appellant's quarters aboard ship did not disclose any traces of marijuana but there were two packages of loose paper for making cigarettes laying on the desk. Appellant said this paper had been in the room ever since the prior occupant had been arrested on 7 December, 1951, in New Orleans, for possession of marijuana.

Subsequent analysis by the U. S. Customs Laboratory at Baltimore, Maryland, disclosed that the eighteen cigarettes contained 118.7 grains of marijuana.

OPINION

Appellant has submitted numerous propositions on appeal in which he contends, in effect, that there is no proof that the seized substance contained marijuana; and that the cigarettes were "planted" by some person aboard the ship with whom Appellant was not on friendly terms. It is also claimed that the order of revocation is too severe because it is based on evidence with which the U. S. Attorney refused to prosecute.

With respect to the last point, I would like to note that this is a remedial proceeding directed towards the protection of life and property at sea and we are not here concerned with action taken - or not taken - by other federal authorities. A particularly significant difference between this administrative action and a criminal prosecution is the requirement as to the burden of proof. The latter requires proof beyond a reasonable doubt; but, herein, it is only necessary to have substantial evidence in order to find the charge and specification proved.

Concerning proof of the nature of the cigarettes which were found on Appellant's person by Sergeant Schmidt, the U. S. Customs Report of Seizure No. 988 was received in evidence and this report states "that the property described below was seized from Miguel Pena (Messman), ex Am. S/S HIBUERAS arriving from Santa Marta, Columbia, at Pier 1, Pratt Street, on December 30, 1951, and has been delivered to the Customs Seizure Room." The property is then described as "18 (eighteen) Marihuana cigarettes 118.7 gr." and the circumstances of the seizure are stated briefly but substantially the same as set forth in my findings of fact. This report is supported by the U. S. Customs Laboratory Report on seizure No. 988 which states: "Net weight of marihuana received

---- 118.7 grains." These two reports supply the chain of evidence to prove that the cigarettes in Appellant's possession contained marijuana.

Appellant supports his contention that the marijuana cigarettes were "planted" in his trousers by stating that the clothes of Appellant were available to anyone not on amicable terms with Appellant; there was no proof of voluntary possession of the marijuana by Appellant while he was aboard the ship; and Appellant would not have submitted himself to a Customs search by leaving the ship if he had knowingly possessed marijuana.

Admittedly, it is possible that the cigarettes were put in Appellant's trouser pocket by someone else. And there is no direct evidence that Appellant knowingly had possession of marijuana aboard the ship. But Appellant's explanation that the cigarettes were "planted" is highly improbable in view of the surrounding circumstances. The Examiner said this story was incredible and he specifically stated, "I do not believe it." I agree with this statement.

There is no point in speculating as to the significance of Appellant having left his trousers on his bunk while taking a shower before going ashore and the absence of direct evidence of possession aboard. The conclusively established facts are that Appellant was apprehended, about two minutes after he left the ship, with eighteen marijuana cigarettes in his possession and wrapped in his own handkerchief. This evidence alone makes out a prima facie case by raising a rebuttable presumption that Appellant knowingly had the marijuana in his possession. Appellant has failed to rebut this presumption with substantial evidence to the contrary.

The evidence against Appellant is bolstered by the concealment of the package in his handkerchief and his attempt to regain possession of the package as soon as Sergeant Schmidt said the word "marijuana." It is also apparent that there could have been no certainty, on Appellant's part, that he would be searched when leaving the pier. He had not even left the ship when Sergeant Schmidt searched the other two men at the main gate. The concealment of the package in his handkerchief indicates that Appellant thought the cigarettes might not be detected even if he was searched. And if he had objected to being searched after reaching the main gate, his guilt would have been perfectly obvious.

CONCLUSIONS

The charge and specification have been proved by substantial evidence. As aptly stated by the Examiner, the great threat presented by narcotics to the safety of a vessel and its crew, makes it necessary for me to revoke a seaman's document if he has been found to have had any association with marijuana or other narcotics. This is necessary in order to carry out the statutory duty of the Coast Guard to protect life and property at sea.

ORDER

The order of the Examiner dated 23 January, 1952, should be, and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 16th day of June, 1952.